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November 30, 2012

Cynthia T. Brown, Chief  
Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D.C. 20423-0001

Re: **Stewartstown Railroad Company**  
**Adverse Abandonment – York County, PA**  
**STB Docket No. AB-1071**

233431  
ENTERED  
Office of Proceedings

NOV 30 2012

Part of  
Public Record

Dear Ms. Brown:

I enclose on behalf of the Stewartstown Railroad Company for consideration of the Board an original and ten (10) copies of a Petition to Re-Open and Stay the Board's Decision of November 14, 2012 granting the application of the Estate of George M. Hart for authority to remove from the Board's jurisdiction a 7.4 mile line of railroad in York County, PA, owned by the Stewartstown Railroad Company.

Thank you for your attention to this matter.

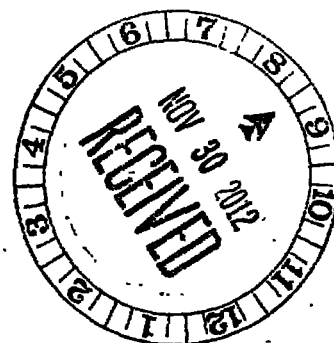
Sincerely,

  
Alex E. Snyder

AES/slm:3766238\_1.DOC  
cc: Keith G. O'Brien, Esq.  
cc: James J. Gilloti, Esq.

FILED  
NOV 30 2012  
SURFACE  
TRANSPORTATION BOARD

FILE RECEIVED  
NOV 30 2012  
SURFACE  
TRANSPORTATION BOARD



BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Docket No. AB-1071

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STEWARTSTOWN RAILROAD COMPANY  
ADVERSE ABANDONMENT  
YORK COUNTY, PA

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**PETITION TO RE-OPEN AND STAY THE BOARD'S DECISION OF NOVEMBER 14,  
2012 GRANTING THE APPLICATION OF THE ESTATE OF GEORGE M. HART FOR  
AUTHORITY TO REMOVE FROM THE BOARD'S JURISDICTION A 7.4 MILE LINE  
OF RAILROAD IN YORK COUNTY, PA OWNED BY THE STEWARTSTOWN  
RAILROAD COMPANY.**

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STEWARTSTOWN RAILROAD COMPANY  
P.O. Box 155  
Stewartstown, PA 17363

Petitioner

Alex E. Snyder, Esquire  
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P.O. Box 15012  
York, PA 17405-7012

Attorney for Petitioner

November 30, 2012

BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, D.C.

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STB Docket No. AB-1071

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STEWARTSTOWN RAILROAD COMPANY  
ADVERSE ABANDONMENT  
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RAILROAD COMPANY**

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The Estate of George M. Hart ( Estate ) filed a third party petition to abandon the Stewartstown railroad in York County, Pennsylvania, on July 7, 2011. The STB granted that the application on November 14, 2012, subject to trail use and environmental and historic preservation conditions. The Stewartstown Railroad Company (SRC) respectfully files this Petition to Re-Open and Motion to Stay pursuant to 49 C.F.R. § 1152.25 because it believes the Surface Transportation Board's ("STB" or "Board") decision was predicated on material error. Moreover, there are substantially changed circumstances with respect to the financial situation of the Railroad.

FACTS

The Estate seeks a third-party or "adverse" abandonment under 49 USC § 10903 of an approximately 7.4 mile line of railroad in York County, Pa., between milepost 0.0 at New Freedom, and milepost 7.4, approximately 0.2 miles east of Stewartstown. the line is owned by SRC. Notice of the application was served and published in the Federal Register on July 27, 2011 ( 76 Fed. Reg. 44,986)

The Estate asserts that a former President and director of SRC, George M. Hart, provided loans totaling \$ 352,415 to SRC over a period of years and that the loans were secured by the assets of SRC in a recorded mortgage and a judgement note,(the "lien"). The Estate seeks the adverse abandonment to allow it to pursue an action at the state level to satisfy the lien.

On August 22, 2011, SRC filed a protest to the application pursuant to 49 C.F.R. § 1152.26,

asserting that: (1) it is a viable railroad business in the process of restoring itself to operation; (2) it has a link to the interstate commerce system through an adjoining railroad owned by York County, Pa. (the former NCR line); (3) it has identified at least one definite freight customer (Pen-Mar Scrap Metal Recycling Facility) and multiple prospective customers that intend to use the Line upon its return to service; (4) its presence as a freight transporter is important to the local rural economy of southern York County; and (5) there is no discernible public interest or legitimate private interest favoring its abandonment.

The Estate filed a reply to SRC's protest on September 6, 2011. The Board also received letters from various local townships and business owners in and around the County of York, Pa., all of which express opposition to the Estate's adverse abandonment application. Letters of protest were also submitted by U.S. Representative Todd Platts, Pennsylvania State Senator Michael Waugh, and Pennsylvania State Representative Stan Saylor.

In its November 14, 2012, decision, the STB found that removing the shield of its jurisdiction by granting adverse abandonment here was consistent with 49 U.S.C. § 10903 and would be in the public interest. The STB based its decision on its finding that the present or future public convenience and necessity both require and permit the proposed adverse abandonment. To arrive at this finding, the STB held there was no present need, and little likelihood of a future need, for rail service over the Stewartstown and that abandonment of the line would not adversely affect rural and community development.

Petitioner contends that the STB exceeded its authority in review of this matter. Additionally, Petitioner contends the STB's decision was based on a material error in misapplying the Public Convenience and Necessity Standard. Finally, Petitioner contends there are changed circumstances warranting reopening the case and staying the Board's decision.

## DISCUSSION

### I. THE STB EXCEEDED THE SCOPE OF ITS AUTHORITY IN REVIEWING THE STEWARTSTOWN ADVERSE ABANDONMENT BECAUSE IT DOES NOT HAVE STATUTORY AUTHORITY TO REVIEW ADVERSE ABANDONMENT CASES

The Board's authority to review abandonment applications is derived from 49 U.S.C. § 10903. The text of Section 10903 itself does not make any mention of "adverse" or third-party abandonments. Moreover, the language of section 49 U.S.C. § 10903 (a)(1) seems to indicate that abandonment can occur only when the rail carrier who owns the line is the moving party. The provision reads: "*A rail carrier providing transportation subject to the jurisdiction of the Board under this part who intends to (A) abandon any part of its railroad lines or (B) discontinue the operation of all rail transportation over any part of its railroad lines, must file an application relating thereto with the Board. An abandonment or discontinuance may be carried out only as authorized under this chapter.*" (emphasis added).

The STB's predecessor, the Interstate Commerce Commission, derived its power to review adverse abandonment cases from case law. *Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134, 145, 66 S. Ct 937, 90 L. Ed. 1132 (1946). ("There is no requirement ... that the application [for

abandonment to the STB] be made by the carrier whose operations are sought to be abandoned.”).

However, in subsequently drafting Section 10903, promulgated specifically for the STB as part of that entity’s formation, Congress declined to include language affording the STB the authority to review adverse abandonments. Assuming this omission by the statute does not affect the legitimacy of adverse abandonments *per se*, nothing in the legislative history suggests Congress intended to give the Board the authority to review them. Moreover, if Congress had intended for the STB to retain the authority to review adverse abandonments, it would have so included it in the language of Section 10903. The Board itself has expressed doubts as to its own authority to review adverse abandonment cases.<sup>1</sup>

## **II. THE BOARD’S DECISION WAS BASED ON MATERIAL ERROR BECAUSE IT MISAPPLIED THE PUBLIC CONVENIENCE AND NECESSITY STANDARD.**

The standard that applies for reviewing an application for authority to abandon a railroad is whether the present or future public convenience and necessity require or permit the proposed abandonment. The STB’s role in applying this standard is to balance that public convenience and necessity against opposing interests. *Texas v. United States*, 642 F.2d 87 (1981). In the instant case, the Board erred in two material respects. First, it undervalued the likelihood of a future need for rail service and the impact of the railroad’s loss on rural and community development. Second, it mischaracterized the Estate’s private interest as being a public interest.

### ***A. The Board’s decision undervalued the public interest in the preservation and restoration of service of the line.***

The future public convenience and necessity neither requires nor permits the proposed adverse abandonment. While there is no present need for rail service over the Stewartstown, there is increasing likelihood of a future need. Moreover, abandonment of the line will adversely affect rural and community development.

It is well established that the Board has a “statutory duty to preserve and promote continued rail service.” *Western Stock Show Ass’n – Abandonment Exemption – in Denver, CO*, 1 STB 13 (1996).

In *Norfolk Southern Railway Company – Adverse Abandonment in St. Joseph County, IN*, STB Decision served February 13, 2008, the Board noted that while applicants claimed, as in this instance, there had been no rail service on the line or request for rail service on the line for at least 10 years and there was “no demonstrable need for future rail service.” Applicants also claimed, as does the Estate in the instant case, that “...NSR has made no effort to solicit traffic

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<sup>1</sup> See *City of South Bend, Indiana v. Surface Transportation Board*, 566 F.3d 1166 (2009) (Kavanaugh, J., and Sentelle, J., concurring) (indicating that the Board itself is conflicted as to whether or not they have the authority to review adverse abandonment cases, stating “...Congress and the Executive Branch would be well-advised to promptly clear up the statutory uncertainty....” *Id.* at 1171. It appears to date that no such effort has been made to clear up this statutory uncertainty and, therefore the premise that the Board does, in fact, have authority to review adverse abandonment cases may be inaccurate.

or reinstitute service....” In spite of these claims by the Applicants in *St. Joseph*, which have been parroted by the Estate in the instant case, the Board still found that there was a “potential for renewed rail operations” and denied the adverse abandonment requested.

The Board has stated “Accordingly we preserve and promote continued rail service where a carrier has expressed a desire to continue operations and has taken reasonable steps to acquire traffic.” *Chelsea Property Owners – Abandonment – Portion of Consolidated Rail Corp.’s West 30<sup>th</sup> Street Secondary Track in New York, N.Y.*, 8 I.C.C. 2d 773, 779 (1992). Despite the Estate’s repeated attempts to belittle SRC’s prospects and its efforts to rebuild rail freight traffic, SRC respectfully submits that those efforts are earnest, ongoing, and not without hope. SRC is, in fact, doing exactly the type of infrastructure and business redevelopment work that strengthens our national rail system at the grassroots level and its efforts forward the STB’s own policies of “preserving and promoting” rail service.<sup>2</sup> While those efforts have proceeded as they can, they have been hampered for several years by two factors beyond the railroad’s control: by the threat of adverse abandonment hanging over its head and by the currently out-of-service condition of its connection to the national rail network. It has been noted—though not sufficiently recognized in the instant case by the STB—that that connection to the national rail network is slated to be reopened in the very near future. Moreover, the principle remaining developable parcel in the region is located not on the connecting railroad, but the Stewartstown itself. No doubt, when freight service returns to the connecting railroad, interest in that parcel and the access provided by the Stewartstown will increase.

It should be self-evident that no business desiring to make use of direct rail service or rail to truck transload service would allow itself to become dependent on a rail carrier that is both under threat of abandonment and is also awaiting a restoration of its connection to the national network. A restoration whose timing to completion and requisite funding are beyond SRC’s control. Thus, pending the outcome of these two issues, any efforts by SRC’s current management to solicit business are, in effect, “hamstrung” from the beginning. Moreover, the Estate’s actions have caused the railroad tremendous expense and distracted its staff from infrastructure work and business development of the sort that would enable the lien to be paid off from regular revenue. No party has proven or conceded that there are any obstacles absent those presented by the Estate itself that would prevent the railroad from finding its way to profitability in the short term. It is a disservice to the SRC and the public and an abuse of the STB’s power to allow the Estate to benefit from the liquidation of a railroad on the premise that that railroad is dead when the Estate itself is solely responsible for killing it. In effectively preventing any future prospect of revenue generation as part of the national system, the Board’s decision can hardly be said to be a step toward to “ensuring railroad creditworthiness.”<sup>3</sup>

In *Yakima Interurban Lines Ass’n – Adverse Abandonment – in Yakima County, Wash.*, AB 600 (Nov. 19, 2004), the Board denied adverse abandonment of a line which, like SRC, was not in operation. However the Board attempts to split hairs in justifying its decision to deny adverse abandonment in that case, yet grant it in this case. In *Yakima*, the Board found there was a public interest in preserving the line noting that “(1) shippers had expressed an interest in using the line again; (2) the connecting Class 1 freight railroad opposed the abandonment; (3) the surrounding

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<sup>2</sup> 49 U.S.C. § 10903

<sup>3</sup> STB Decision page 3.

local governments not only opposed the abandonment but also had communicated their willingness to provide funds to assist with the restoration of YILA's rail line; (4) a third party rail operator stated an interest in entering into a contract to provide rail freight service over YILA's line; and, (5) the State of Washington Department of Transportation had committed to provide financial assistance to permit Yakima County to acquire the line from YILA, clear its liens, and complete restoration of YILA's line for freight rail service."

Similarly, in the instant case, (1) shippers have expressed an interest in using the line again; (2) until such time as SRC's connection with the national rail network is re-established the two Class 1 freight railroads (CSXT and Norfolk Southern) to which SRC could connect via York Railway (YRC) have no immediate interest in the case. It is reasonable to surmise that they would not until such time as the connection is restored and the threat of adverse abandonment is lifted thereby allowing SRC to promote itself as a freight carrier capable of eliciting confidence from prospective rail customers; (3) the surrounding local governments have expressed opposition to abandonment, however, due to current financial constraints cannot at this time provide funding. Nonetheless the intent to have the line preserved and willingness to participate in whatever manner they can is still there. SRC should not be penalized for lack of a local public funding stream; (4) a third party rail operator has, in fact, expressed interest in providing service over the line, and (5) the timing in which this case arises holds the state's ability to fund rail infrastructure and historic preservation projects hostage, though the state's designation of the line as eligible for the National Register of Historic Places indicates its belief that it is a resource worthy of preservation.

In summation, it would appear that SRC, York County and the Commonwealth of Pennsylvania are being held to a higher standard than their respective counterparts in *Yakima*.

In *St. Joseph*, the Board noted "... an applicant seeking Board authorization for an adverse (involuntary) abandonment must meet a heavy burden. That is why the Board has stated in the past that authority for an adverse abandonment would not be granted, even in the absence of current traffic on the line, if there is reasonable potential for future railroad use." Petitioner submits that the Estate has not met this burden here and Board may have, in fact, deviated from this standard in its Decision in the instant case.

Furthermore, in *St. Joseph*, the Board stated "in assessing the merits of an adverse abandonment request, we look not only the present or future interests in rail service, but also at the other interests that are implicated. In doing so, we are mindful of Congress' intent, as expressed in many statutory provisions, that lines be kept within the rail system where possible."

Those other interests have been noted by the Board in its Decision and include "...letters from various local townships and business owners in and around the County of York, Pa., all of which express opposition to the Estate's adverse abandonment application. Letters of protest were also submitted by U.S. Representative Todd Platts, Pennsylvania State Senator Michael Waugh, and Pennsylvania State Representative Stan Saylor." Clearly these letters of protest, when taken together, signify a significant public interest in preserving rail service.

Indeed, Commissioner Begeman, in her dissenting opinion confirmed this fact when she stated “The record shows that the carrier, prospective rail shippers, local government officials, and others support maintaining the rail line. As such, I believe doing so is the approach that is in the true public interest.”

*B. The Board mischaracterized the interests of the Estate and its residual beneficiary, the Bucks County Historical Society, as a public interest in its determination of PC&N.*

The Estate has failed to cite any specific public purpose served by the abandonment. In *New York Cross Harbor R.R. v. Surface Transportation Board*, 374 F.2d 1117 (D.C. Cir. 2004 ), the Court of Appeals vacated and remanded a Board decision granting an adverse abandonment over the railroad’s opposition noting that the *adverse abandonment applicant had not established any specific public purpose* (emphasis added ).

Commissioner Begeman, in her dissenting opinion, stated, “In fact, the only party that has weighed in to support abandonment is the applicant itself, which is seeking to fill the coffers of an estate’s beneficiary – a matter that the Board should not have a role in one way or the other, let alone be the overarching policy objective that it appears to be in this decision.” Commissioner Begeman went on to state, “I do not read, nor can I interpret, the rail transportation policy in 49 U.S.C. 10101 or any other parts of the Board’s governing statute to allow it to force a rail line abandonment over the clear objections of the carrier, local government officials, potential shippers, and other interested parties when there isn’t an overriding and compelling public purpose for which the line in question is needed. *Yet this adverse abandonment has little to do with the public good, but instead serves only private interests*” (emphasis added).

SRC recognizes that the STB has a legitimate need to serve the public interest in railroad creditworthiness. SRC recognizes the legitimate public interest in fulfilling debt obligations and the efficient probate of estates. However, while Petitioner understands that the Estate (perhaps erroneously) believes the forced abandonment of the line is the best method to achieve debt collection *quickly*, nothing in statute, case law or logic suggests that the Estate’s demands for *immediacy* in paying its private debt are so consonant with the public interest so as to be compelling, much less that that payment of private debt outweighs the public benefit to saving the line. Much the opposite, when both interests can be satisfied—that is, the debt paid off without sacrificing the railroad and the public benefit it represents, the balance of interests must council toward denying the abandonment application and paying the debt over time. Here, only by allowing the railroad to begin operations and revenue generation can both ends be met.

Though nothing has prevented the beneficiary Bucks County Historical Society from negotiating a payment plan with SRC directly to arrive at an outcome that truly respects the public interest, they have thus far refused invitations to take that step. A contractually-established plan between the parties could allow a termination date after which salvage, if still warranted, could occur without protest from SRC. Such an option would remove the Estate from the middle and allow it to be closed. Such an arrangement would protect the beneficiary’s interest, the public interest in having debts paid and estates efficiently probated, and the public interest in having the line preserved.



Allowing this Decision to stand sets the potentially dangerous precedent for all railroads that any claim, no matter how small and by any private party with absolutely no interest in rail transportation policy, much less the greater public good, could, in fact force any railroad into adverse abandonment proceedings. Clearly, such a precedent is not in the best interest of the rail transportation policy.

On the contrary, the preservation and continuing revitalization of the Stewartstown are in the public interest. While freight traffic is likely but may take some time to develop, tourist passenger operations are likely in the near future. Rail excursion operations and historic preservation interests, while generally considered to be outside the Board's jurisdiction, are nonetheless a matter of public interest and of economic growth to the communities. The Board's discounting of SRC's projected ridership numbers failed to consider the fact that the SRC now connects with what will be one of the nation's premier heritage rail attractions—Steam Into History. Steam Into History is on the record as supporting the Stewartstown in its revival. Steam Into History's own project involves the construction of a brand-new steam locomotive and passenger cars and will commemorate President Lincoln's rail trip to Gettysburg to deliver his Address. The communities along the Stewartstown recognize the value this connection has and could be irreparably harmed should the Board remove this line from its jurisdiction.

Historic railway preservation, of which the SRC is a unique example and one already defined as being eligible for inclusion in the National Register of Historic Places, is clearly in the public interest. While not necessarily explicit in the transportation law which the Board must apply here, Congress and various statutes including, but not necessarily limited to, the National Historic Preservation Act and the National Historic Landmark and National Register of Historic Places programs clearly reflect an intent to preserve and interpret cultural and historic resources. While the Board has conditioned its decision on the completion of the Section 106 process, the fact of the matter is that approving abandonment in this instance will all but ensure adverse effects which cannot be mitigated. Removal of rail or other rail assets not only prevents the SRC for generating revenue from freight or passenger operations, it destroys the character defining features of what makes the railroad a railroad. Setting the stage for the abandonment of the line and the removal of the rail would run counter to the intent of Congress in these statutes.

### III. THERE ARE CHANGED CIRCUMSTANCES AND NEW FACTS WARRANTING THE RE-OPENING OF THE CASE AND STAYING THE BOARD'S DECISION.

Petitioner maintains that if both interests can be satisfied—that is, the debt paid off without sacrificing the railroad and the public benefit it represents, the balance of interests must council toward denying the abandonment application.

SRC desires to repay the lien without liquidating the railroad. Despite the fact that representatives of the Estate and the residuary beneficiary, the Bucks County Historical Society, have refused to speak with the SRC directly about a repayment plan or negotiate terms, SRC has, during the course of the past several years, taken steps to raise the ransom placed on the line's head. To wit, SRC is prepared to offer a settlement of the lien held by the Hart Estate in an amount not less than \$ 275,000.00.

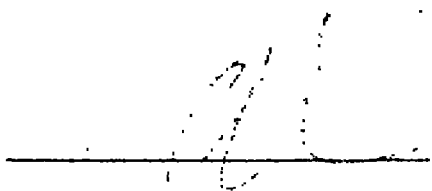
## CONCLUSION

*In Norfolk Southern Railway Company -- Adverse Abandonment -- St. Joseph County, IN, STB Decision served February 13, 2008, the Board noted "It may be that CLS&SB's efforts to resume service will ultimately prove fruitless, but we will not short-circuit them at the outset." In this same Decision denying adverse abandonment the Board further noted that even though applicants claimed the line had degraded to the point where service was no longer feasible, there was a carrier whose efforts to acquire and restore the lines attested to the potential for future operations. That carrier was willing to carry traffic over the line and that track can be made adequate to handle the service.*

Petitioner hereby respectfully requests that the Board grant it the same consideration allowed to CLS&SB as it attempts to restore service to its line.

Petitioner understands and acknowledges the complexity of this case and entreats the Board to avoid the precedent of allowing a private interest to short-circuit the efforts of a rail carrier doing its best to fulfill the same mission to which the STB itself is dedicated. Petitioner respectfully asks the Board to recommend an outcome that fully adheres to the intent of the rail transportation policy in 49 U.S.C. 10101 and ultimately and adequately address the interests of all parties.

Respectfully submitted,



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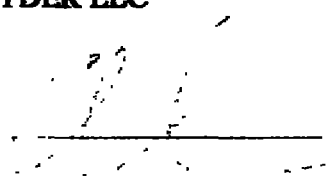
## **CERTIFICATE OF SERVICE**

I hereby certify that on this date foregoing Petition to re-Open and Stay is being served by first class mail, postage pre-paid at York, Pennsylvania, addressed as follows:

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